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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-764

NORTHERN CALIFORNIA SUPERMARKETS, INC.,
Petitioner,

vs.

CENTRAL CALIFORNIA LETTUCE PRODUCERS COOPERATIVE, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

OPINIONS BELOW

Petitioner, Northern California Supermarkets, Inc. ("Northern"), and respondents cross-moved for summary judgment on stipulated and uncontroverted facts. The United States District Court for the Northern District of California granted respondents' motion for summary judgment and denied petitioner's motion in a detailed and carefully reasoned twenty-page opinion. The parties having waived oral argument, the Court of Appeals for the Ninth Circuit affirmed the District Court's judgment per curiam, adopting the District Court's opinion. The Court of Appeals further referred to a ruling of the Federal Trade Commis-

sion which dismissed a similar complaint filed against Central California Lettuce Producers Cooperative and certain of its members in a separate yet related proceeding. The opinions of the Ninth Circuit and the District Court are reprinted as Appendix A and Appendix B, respectively, to the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Whether the setting of prices by an agricultural cooperative is a marketing function protected under the antitrust laws?

2. Whether the facts in the record show marketing activity protected under antitrust laws?

STATUTES INVOLVED

The pertinent provisions of the statutes involved (Section 6 of the Clayton Act, 15 U.S.C. § 17, Section 1 of the Capper-Volstead Act, 7 U.S.C. § 291, and Section 5 of the Cooperative Marketing Act of 1926, 7 U.S.C. § 455) are set forth in Appendices C, D and E to the Petition, 23a-25a.

STATEMENT OF THE CASE

Petitioner Northern California Supermarkets, Inc., ("Northern") brought this action against the Central California Lettuce Producers Cooperative ("Central"), an organization composed of twenty-two Salinas Valley lettuce growers,[1] and against nine of Central's members, charging

[1]It is admitted and uncontroverted that all members of Central are actual growers of lettuce. Pet. 3; 413 F.Supp. at 986.

them with violating Section 1 of the Sherman Act. On cross motions for summary judgment, the District Court found that there was no dispute as to any material facts. 413 F. Supp. at 985 n.2. In an opinion by the Honorable William H. Orrick, Jr., the District Court summarized the facts, which Northern in no way disputed before the Court of Appeals, as follows:

> "Defendant Central is a nonprofit cooperative association, without capital stock, incorporated under the provisions of Chapter 1, Division 20, of the Agricultural Code of the State of California, for the purpose of providing mutual help in connection with producing and marketing, including selling, of any farm product of its members. *Central's purpose, among other things, is to improve conditions in the produce industry for the mutual benefit of its members as producers* by promoting, fostering, and encouraging the intelligent and orderly marketing of agricultural products through cooperation; eliminating speculation and waste; making the distribution of agricultural products between producers and consumers as direct as can be officially done; stabilizing the marketing of agricultural products; encouraging efficiency and economy in marketing; preventing the demoralizing of markets resulting from dumping and predatory practices; mitigating the recognized evils of a marketing system under which prices are set for the entire industry by the weakest producers; and fostering the ability of the members of the cooperative to obtain prices for their products in competitive markets which are fair prices but not prices inflated beyond the reasonable value of such products by reason of artificially-created scarcity of such products or other predatory practices which would injure the public interest."

413 F.Supp. at 985-986 (emphasis added).

"In May, 1973, Central entered into an identical 'Cooperative Marketing Agreement' with each of its twenty-two members, including the nine-member defendants. Under the terms of the Agreement, *the members exchange information* regarding the actual and expected status of all crops *and agree* (a) *to inspection of the condition, quality, and quantity of their crops*, (b) *to make no discounts or concessions in lieu of brokerage*, (c) *to sell lettuce within the limits of ceiling prices and floor prices established by Central and not to ship lettuce which has not been sold or consigned*, and (d) *to report delinquent accounts and chronic complainers to Central. Members have also agreed that lettuce sold by the members shall be in master containers, which identify the lettuce as being sold by a member of Central.* During 1973-1974, the years which are concerned in this action, each member-defendant had a seat on the Board of Directors, as well as on the Executive Committee, of Central. The Executive Committee met at least weekly and determined the pricing policy to which each member would adhere in the sale of lettuce for a specified period. The Committee usually determined a ceiling price and, in at least one case, a minimum and a maximum price to be charged by its members. *The Committee members exchanged market information in the process of determining pricing policies.*"

413 F.Supp. at 986-987 (emphasis added).

"Plaintiff and defendants agree that the primary activity of Central is to set prices or price ranges to which members are required to adhere in the sale of their lettuce. *The record indicates that Central also engages in other activities related to the marketing of lettuce. For example, Central gathers and disseminates information concerning lettuce planting, harvesting, and shipment. Information is also exchanged by the members concerning delinquent accounts and 'chronic customer complainers'. In addition, Central coordinates policies with respect to marketing practices which proved harmful to lettuce growers and has undertaken promotional campaigns aimed at bolstering lettuce sales.*"

413 F.Supp. at 987 (emphasis added).

"There is no allegation that Central or its members have combined or attempted to combine with nonproducers, nor is there any allegation that defendants have engaged in predatory practices or have attempted to monopolize, or monopolized, the market by unlawful means."

413 F.Supp. at 990.

On the basis of these facts, the District Court held that Central and its members were entitled to the protections afforded by Section 6 of the Clayton Act and by the Capper-Volstead Act.[2] Accordingly, respondents' cross motion for judgment was granted and Northern's motion denied.

Northern appealed from that judgment to the Court of Appeals for the Ninth Circuit. In a per curiam opinion, the Ninth Circuit affirmed, adopting the District Court's extensive opinion. (The Ninth Circuit also cited to the opinion of the Federal Trade Commission in *Central California Lettuce Producers Cooperative, et al.*, Docket No. 8970, July 25, 1977, CCH Trade Reg. Rpts. ¶ 21,337. The complaint filed by the Federal Trade Commission and the initial

[2]Respondents have also claimed the protection of Section 5 of the Cooperative Marketing Act of 1926. The courts below did not rule on this claim since they found the protections afforded by Section 6 and Capper-Volstead applicable.

decision by the administrative law judge therein was clearly the genesis of the Northern's action. The Commission, however, in a lengthy opinion, reversed the administrative law judge's initial decision and dismissed the complaint.) This Petition for Certiorari followed.

REASONS FOR DENYING THE WRIT

Simply stated, Northern's Petition should be denied since there is nothing significant about this case which warrants this Court's attention. The decision below is not in conflict with the decision of any other court of appeals, is not in conflict with applicable state law, and is not in conflict with the applicable decisions of this Court. The courts below did not in any way depart from the accepted and usual course of judicial proceedings. The questions sought to be raised before this Court were fully and correctly analyzed below, and were decided in accordance with all applicable authorities. And, Northern's Petition would have this Court take upon itself the role of redeciding what is essentially a factual question.

I. THE DECISION BELOW IS WELL-REASONED AND FULLY SUPPORTED BY THE UNCONTROVERTED FACTS.

A. Northern's Petition Asks This Court to Ignore Relevant and Undisputed Facts.

The sole legal argument made by Northern in its Petition is that "all Central does is provide a forum for its individual members to fix lettuce prices" (Pet. 3), and that "price fixing [must] be ancillary to and an incident of the collective marketing of agricultural products" for it to be protected under the antitrust laws. (Pet. 7) In short, Northern asks this Court to review the decision below on the premise that "no significant, or material activity was performed by the Cooperative other than price fixing." (Pet. 5)

Northern's factual premise for this argument, however, is contradicted by those facts which the District Court found were undisputed. 413 F.Supp. at 985 n.2. They include a *Cooperative Marketing Agreement* entered into in May, 1973, under which the members of Central agreed through it (1) to exchange information regarding the status of their crops, and (2) to inspect the condition and quality of their crops, (3) to make no discounts in lieu of brokerage upon the sale of their crops, (4) to sell lettuce within the limits of floor and ceiling prices established by Central, (5) not to ship lettuce which had not been sold or consigned, (6) to report delinquent accounts to Central, (7) to sell lettuce in master containers which identified the lettuce as being sold by a member of Central, and (8) regularly to exchange marketing information with one another. 413 F.Supp. at 986-987. The District Court specifically found "that the primary activity of Central is to set prices or price ranges . . . [*but that the*] *record indicates that Central also engages in other activities related to the marketing of lettuce.*" 413 F.Supp. at 987.

Northern's petition asks this Court to ignore all those marketing activities in which the District Court found Central was indisputably engaged, and to review the decision below on a totally different factual premise for which there is no foundation.

This none too subtle attempt to ignore the facts of this case at this late date is, of course, a response to the clearly correct holding below that, on the undisputed facts, the governing precedents place respondents squarely within the protections given to agriculture by the antitrust laws:

> The *aggregate of activities* of Central constitute "collective marketing" within the meaning of the phrase as defined in *Treasure Valley* [497 F.2d 203 (9th Cir.), *cert. denied,* 419 U.S. 999 (1974)]. Here, as in *Treasure Valley,* Central was "supplying market information and performing other acts . . . involved in the transferring of title" of the produce . . . . Northern tries to distinguish *Treasure Valley* . . . [but it] is a distinction without a difference.

413 F.Supp. at 992 (emphasis added). The facts in the record clearly show that Central is engaged in an "aggregate of activities" which constitute "marketing" in the well-established meaning of that term.

B. Even If Northern's Characterization of the Facts of This Case Is Correct, Respondents Nonetheless Fall Within the Protections Afforded to Agriculture Under the Antitrust Laws.

Although the District Court found that the facts would not support Northern's assertion that Central engaged in no material action other than price fixing, it also reached an alternative holding that *"even if* Central engaged in no other collective marketing activities, mere price-fixing is clearly within the ambit of the statutory protection. *It would be ironic and anomalous to expose producers, who meet in a cooperative to set prices, to antitrust liability, knowing full well that if the same producers engage in even more anti-competitive practices, such as collective marketing or bargaining, they would clearly be entitled to an exemption."* 413 F.Supp. at 992 (emphasis added). The "statutory protection" which the court found existed was that established by Section 6 of the Clayton Act and by Section 1 of the Capper-Volstead Act.

Section 6 grants immunity from the antitrust laws to "agricultural . . . organizations, instituted for the purpose of mutual help, and not having capital stock or conducted for profit." 15 U.S.C. § 17. The District Court expressly found that Central satisfied the structural elements of Section 6. 413 F.Supp. at 988-989. Since its requirements are met, Section 6 provides: (1) that "nothing contained in the antitrust laws shall be construed to forbid the existence and operation of . . . agricultural associations . . .;" (2) that "nothing contained in the antitrust laws shall be construed . . . to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objectives thereof;" and (3) that neither "shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws." 15 U.S.C. § 17.

As the District Court noted, "Capper-Volstead was enacted to clarify and extend the Section 6 exemptions." 413 F.Supp. at 989 (citing *Case-Swayne Co. v. Sunkist Growers,* 389 U.S. 384, 391 (1967)). It expanded the types of agricultural associations protected under the antitrust laws and enumerated various kinds of activities in which they could properly engage: "processing, preparing for market, handling, and marketing. . . ." 7 U.S.C. § 291.

Northern does *not* argue that Central fails to meet the organizational requirements of Section 6 and Capper-Volstead. What it argues is that Central and Central's members lost the protections of Section 6 and Capper-Volstead because Central did not engage in enough "collective activity." Northern's position is that, where an agricultural cooperative does no more than act as an agency for fixing the prices at which its members will sell, it is not entitled to antitrust immunity; that price fixing is only protected if it is ancillary to other cooperative activities. (Pet. 6-7)

In rejecting Northern's argument, the courts below relied heavily on the leading decision of this Court interpreting Section 6 and Capper-Volstead, *Maryland and Virginia Milk Producers Ass'n v. U.S.*, 362 U.S. 458 (1960). This Court there said:

> Section 1 of the Capper-Volstead Act also provided that among the "legitimate objects" of farmer organizations were "collectively processing, preparing for market, handling, and marketing" products through common marketing agencies and the making of "necessary contracts and agreements to effect such purposes." . . . This indicates a purpose to make it possible for farmer-producers to organize together, set association policy, [and] fix prices at which their cooperative will sell their produce. . . .

362 U.S. at 466. The District Court found that, in using the phrase, "among 'the legitimate objects,'" the above-quoted passage "necessarily implies that (a) Section 6 and Capper-Volstead, although overlapping, are not synonymous, and (b) it is not necessary for a farmer association to engage in all of the enumerated activities to qualify for the exemption." 413 F.Supp. at 991. It further held that "Central's activities are consistent with the purpose of the statutes 'to make it possible for farmer-producers to organize together, set association policy, fix prices at which their cooperative will sell their produce.'" *Id.*, quoting 362 U.S. at 466.[8]

In addition to the precedents of this Court, the courts below relied upon various lower court holdings in reaching their conclusion that *"even if"* Central had done no more than fix the prices at which its members sold their crops, it was entitled to protection under the antitrust laws. In particular, the recent decision in *Treasure Valley Potato Bargaining Ass'n v. Ore-Ida Foods, Inc.*, 497 F.2d 203 (9th Cir.), *cert. denied*, 419 U.S. 999 (1974), was deemed controlling. *See* 413 F.Supp. at 991. There, the court had held that, though an agricultural cooperative did not process, prepare for market, handle or actually sell the crops of its members, it was entitled to protection under the antitrust laws since its activities did constitute collective marketing. The primary activity of the cooperative was to fix prices for its members' crops. This, held the court, was clearly within the plain meaning of the word "marketing" as used in Capper-Volstead. *Id.* at 497 F.2d 215.

The final element leading to the rejection of Northern's argument, however, was its simple incongruity. In arguing

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[8]The District Court fully examined the legislative history of Capper-Volstead, and noted that Congressman Volstead had described its aim as "to make the provisions of the bill sufficiently liberal so that all cooperative farm associations operated in good faith for the benefit of its members might avail themselves" of its provisions. It also quoted Senator Reavis's observation that the legislation would allow a farmer, through cooperation, "to fix the price of the thing that he raises." *See* 413 F.Supp. at 993.

that Central and its members had lost their protection under the antitrust laws because they had only combined to fix the prices of their crops, Northern not only ignored the factual record, but, in effect, argued that Central and its members had lost their protection because they are not anticompetitive enough. Though Northern has never defined how much "collective activity" it thinks a cooperative must engage in before it is entitled to protection, its position that too little collective activity forfeits the protection of the antitrust laws is, quite simply, perverse. Or, in the District Court's words, "ironic and anomalous." 413 F.Supp. at 992.

II. THE DECISION BELOW IS FULLY CONSISTENT WITH ALL RELEVANT PRECEDENTS.

As has previously been pointed out, the Court of Appeals below adopted the District Court's opinion as its own. That opinion, in turn, found controlling the recent decision in *Treasure Valley Potato Bargaining Ass'n v. Ore-Ida Foods, Inc.*, 497 F.2d 203 (9th Cir.), *cert. denied*, 419 U.S. 999 (1974). *See* 413 F.Supp. at 992.

The Court of Appeals also cited in support of its decision the opinion of the Federal Trade Commission in *Central California Lettuce Producers Cooperative, et al.*, Docket No. 8970, July 25, 1977, CCH Trade Reg. Rpts. ¶ 21,337. In the FTC opinion the very activities here challenged, and the same cooperative and its membership, were held to be protected by Capper-Volstead. In response to the argument that Central had not engaged in enough "collective activities", the FTC said, "Congress has manifested no intent to mandate any particular degree of vertical integration as a precondition to Capper-Volstead immunity." At p. 21,235. In response to the argument that price-fixing was not a legitimate cooperative activity, the FTC said, "Whatever 'marketing activity' excludes, it would surely seem to include establishing an asking price as an essential element of negotiations looking toward a sale." At p. 21,237. And in response to the argument that too little cooperative activity forfeits the protection of Capper-Volstead, the FTC said, "Complaint counsel's argument is not strengthened by the anomaly it introduces. . . . [A] cooperative would be hard-pressed to know just what degree of corporate integration would be required to qualify under Capper-Volstead were we to adopt complaint counsel's theory. . . . As the Supreme Court said, in a different context, the Capper-Volstead Act does not lend itself 'to such an incongruous immunity-distinction . . . as that urged here.' " At pp. 21,238-21,239.

The key relevant precedents of this Court are *Maryland and Virginia Milk Producers Ass'n, Inc. v. U.S.*, 362 U.S. 458 (1960), and *Sunkist Growers, Inc. v. Winckler & Smith Citrus Prods. Co.*, 370 U.S. 19 (1962).[4] In the *Milk Producers* case, as has previously been pointed out, this Court clearly indicated that the specifically enumerated Capper-Volstead "legitimate objects" of an agricultural cooperative were neither an exhaustive listing of "legitimate objects" nor a mandatory organizational chart. And, this Court further indicated, specifically, that one of the purposes of

[4]The recent decision of this Court in *National Broiler Marketing Ass'n v. U.S.*, ... U.S. ... (1978), and Northern's misplaced reliance upon it, is discussed in Section III, *infra*.

the agricultural exemptions to the antitrust laws was Congress's desire to allow farmers to fix the prices of their crops. *See* 362 U.S. at 466. The *Sunkist Growers* decision is directly pertinent to Northern's assertion that protection under the antitrust laws turns upon some magic and undefined formula of integration and cooperation. There, this Court held that "grave legal consequences" should not turn on "organizational distinctions that are of *de minimis* meaning and effect." *See* 370 U.S. at 29.

The three lower court decisions which, other than those decisions already discussed herein, are most clearly relevant to the instant case are *Washington Crab Ass'n,* 66 F.T.C. 45, 105 (1964), *In re Florida Citrus Mutual,* 53 F.T.C 973, 1010 (1957), and *U.S. v. Maryland Cooperative Milk Producers,* 145 F.Supp. 151 (D.D.C. 1956). In all three cited cases it was held that a cooperative organization otherwise entitled to an antitrust exemption did not forfeit that protection simply because its chief, or only, activity was to serve as a vehicle through which its members fixed the prices at which their products would be sold.

Indeed, the only "authority" adduced by Northern in support of its argument that cooperative activity among farmers must include more than price fixing is a three-year-old speech given at a convention in New Orleans by a then Deputy Assistant Attorney General. *See* Pet. 6. Review of the decision below by this Court is clearly not called for to resolve such an illusory "conflict."

III. THIS COURT'S RECENT DECISION IN NATIONAL BROILER MARKETING HAS NO RELEVANCE TO THE ISSUES PRESENTED IN NORTHERN'S PETITION.

In *National Broiler Marketing Ass'n v. U.S.,* ..... U.S. ..... (1978), this Court held that a cooperative which included nonfarmer members could not claim protection under Capper-Volstead. That holding has no impact upon this case since it is the undisputed fact that all of Central's members are actual growers of lettuce. Pet. 3; 413 F.Supp. at 986.

In its Petition, however, Northern cites the concurring opinion of Mr. Justice Brennan in *National Broiler Marketing* and attempts to read into that case a new ground for forfeiture of the protections of Capper-Volstead: "bigness is badness." Specifically, Northern argues that the members of Central are not small, family-held farms, but rather large corporate farms, sometimes corporate subsidiaries of larger corporations. Such farms, says Northern, are not entitled to the protections given to agriculture under the antitrust laws. Pet. 10-11.

Three brief observations should be made about Northern's argument. First, the District Court found, and Northern does not dispute the fact, that the members of Central are all engaged in the actual growing of lettuce. Second, Northern's "bigness is badness" argument was not advanced in its complaint, was not litigated below, has no basis in the record, and is based solely on dicta in a concurring opinion. Third, Northern's now proferred argument is hopelessly at odds with the theory of its case which Northern has all along relied upon and even now advances. Northern contends in one breath that "bigness

is bad", and in the next that Central has forfeited its protection for not being more integrated and assuming more functions which would greatly increase its power and, *a fortiori,* make it more anticompetitive.

Northern would have this Court rewrite the provisions of the antitrust laws governing agriculture on the theory that something called "agribusiness" has no right to their protections. But, the majority of this Court observed in *National Broiler Marketing,* "We may accept the proposition that agriculture has changed in the intervening 55 years [since Capper-Volstead was enacted], but, as the second Mr. Justice Harlan said . . . a statute 'is not an empty vessel into which this Court is free to pour a vintage that we think better suits present-day tastes.' Considerations of this kind are for the Congress, not the courts." ..... U.S. ..... (citations omitted).

As now written by Congress, the protection afforded agriculture under the antitrust laws bears "witness to general acceptance of the view that the differences between agriculture and industry call for differentiation in the formulation of public policy. . . . These various measures are manifestations of the fact that in our national economy agriculture expresses functions and forces different from the other elements in the total economic process." *Tigner v. Texas,* 310 U.S. 141, 145-147 (1940). Those who would seek to change the law because of some alleged change in the nature of agriculture should seek appropriate legislative action and not, as here, attempt to have the courts substitute their judgment for that of Congress.

Finally, Northern's "bigness is badness" theory is especially hollow in the context of the present case. As this

Court recognized in *National Broiler Marketing,* the purpose of the antitrust exemptions is to enable food producers "to bolster their market strength" so that they might better deal with the middlemen who stand between them and the ultimate consumers of their crops. ..... U.S. ..... Northern, a retailer of groceries, is such a middleman. Northern controls twenty supermarkets scattered throughout Northern California. 413 F.Supp. at 985. During the time period relevant to this case, Northern was a member of a buyers' cooperative through which it purchased fresh produce, including lettuce. And that cooperative, United Grocers, dealt in over one-third of a billion dollars in merchandise in 1973. (R. 298-299, 553) This is precisely the situation which Congress had in mind when it decided that farmers needed to be given the ability to join together to increase their economic bargaining power.

CONCLUSION

For the foregoing reasons, it is submitted that the Petition for a Writ of Certiorari should be denied.

December 7, 1978.

Respectfully submitted,

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